92-378

Supreme Court, U.S.
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CASE NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1992

Curtis R. Vorwald,

Petitioner,

v.

School District of River Falls, River Falls Board of Education, and Charles R. Brenden, Superintendent of Schools,

Respondents.

Petition for A Writ of Certiorari to the Wisconsin Supreme Court

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Petition for Writ of Certiorari

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*Edward F. Vlack, III
John M. O'Boyle
Counsel for Petitioner
DAVISON & VLACK
200 East Elm Street
River Falls, Wisconsin 54022
(715)425-1525

*Counsel of Record

QUESTION PRESENTED

In a 42 U.S.C. §1983 action brought in state court, does a public school's personnel policy rise to the level of a property interest, as defined by the Supreme Court of the United States, so as to allow the employee procedural due process rights to notice and hearing prior to termination of employment?

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School District of River Falls, River Falls Board of Education, and Charles R. Brenden, Superintendent of Schools,

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Petition for A Writ of Certiorari to the Wisconsin Supreme Court

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The Petitioner, Curtis R. Vorwald, respectfully prays that a writ of certiorari issue to review the opinion and judgment of the Wisconsin Supreme Court, rendered in this proceeding on April 10, 1992 and finalized by denial of a motion to reconsider on June 2, 1992.

OPINION BELOW

The opinion of the Wisconsin Supreme Court, is reported in 167 Wis.2d 549, 482 N.W.2d 93, (1992) and the

opinion of the Wisconsin Court of Appeals is reported in 160 Wis.2d 536, 466 N.W.2d 683 (1991). Both appear in the appendix hereto. (A-3 and A-18 respectively).

JURISDICTION

The petitioner is seeking review of the Wisconsin Supreme Court's decision dated April 10, 1992. A motion to reconsider by the petitioner was denied by the Wisconsin Supreme Court on June 2, 1992 and this Petition for Certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28, §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Curtis R. Vorwald, after nearly eighteen years of employment as a custodian for the School District of River Falls, Wisconsin, was terminated by the River Falls School District on September 19, 1988. (Brenden affidavit, R-15).[1] The decision to terminate Vorwald was allegedly made on the basis of his inability to perform his job due to certain work restrictions placed on him as a result of a workplace injury he suffered August of 1987. (Healy affidavit, R-15).

At the time Vorwald was terminated, the River Falls School District had a specific policy in place regarding the dismissal of non-certified support staff, such as Curtis R. Vorwald. This policy clearly and specifically states the Board of Education was obligated to provide a non-certified support staff employee with written notice of the grounds for termination and an opportunity to be heard, before terminating such employee. (A-27).

It is undisputed that Curtis R. Vorwald did not receive any written notice of the grounds for termination prior to the school district termination of his employment on September 19, 1988. Further, the school district has not claimed it gave Curtis R. Vorwald any written notice at all of its intention to terminate his employment or its intention to even consider terminating his employment on September 19, 1988.

However, the facts are in dispute as to whether or not Curtis R. Vorwald received any oral notice, prior to

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[1] "R" hereafter refers to the record transmitted to the Court of Appeals by the Clerk of Court for Pierce County.

the September 19, 1988 meeting of the school board, of the school district's intention to terminate his employment or its intention to even consider terminating his employment. (Vorwald and Brenden Affidavits R-19 &16). The facts are also disputed as to whether or not Curtis R. Vorwald was unable to perform his duties as custodian with the school district.

Curtis R. Vorwald filed a complaint in Circuit Court for Pierce County, Wisconsin against the School District of River Falls, the River Falls Board of Education and Charles Brenden, Superintendent of Schools, under Title 42, U.S.C. §1983, alleging a violation of Vorwald's rights under the Fifth Amendment of the United States Constitution, as enforced through the Fourteenth Amendment. Vorwald alleged he had been terminated without due process. (R-2)

Approximately one month before trial, the defendants moved for summary judgment on the ground that Vorwald had no property interest under Wisconsin law and that Vorwald had failed to exhaust administrative remedies under the Wisconsin Workers' Compensation Act. (R-7)

The Wisconsin circuit court granted the defendants' motion for summary judgment on the basis that the exclusivity provision of the Wisconsin Workers' Compensation Act barred Vorwald's 1983 action. Vorwald's motion for reconsideration was denied by the circuit court.

Vorwald appealed the circuit court decision to the Wisconsin Court of Appeals. The Wisconsin Court of Appeals reversed the circuit court's summary judgment

order and ruled in favor of Vorwald and remanded the matter back for trial.

The defendants requested certiorari to the Wisconsin Supreme Court. Although the Court of Appeals felt the issue of property interest had not been raised (A-22), the Wisconsin Supreme Court held that the issue of whether Vorwald had a property interest in his employment was properly raised by the school district in its brief before the Wisconsin Court of Appeals. (A-5 and A-6).

It should be noted that the defendants in their brief to the Wisconsin Court of Appeals (at page two) conceded there is a material issue of fact concerning whether or not Curtis R. Vorwald did have a property interest in his employment, based upon the theory that the board's dismissal policy for non-certified support staff created a contractual right in favor of Curtis R. Vorwald.

Despite this concession, the Wisconsin Supreme Court held that the personnel policy did not abrogate Vorwald's employee-at-will status and the policy does not rise to the level of rules or understandings that stem from an independent source such as state law that are required to support claims of entitlement under Roth and therefore Vorwald had no property interest in his employment. Vorwald v. School District of River Falls, 167 Wis.2d 549, 482 N.W.2d 93 (1992) (A-10). In a concurring opinion, one of the justices questioned whether or not the property interest question had been fully briefed. (A-10). A request for reconsideration for that reason was, however, denied.

REASONS FOR GRANTING THE WRIT

I. THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S PRIOR HOLDINGS IN BOTH BD. OF REGENTS OF STATE COLLEGES V. ROTH AND PERRY V. SINDERMANN WITH REGARD TO THE SCOPE OF A PROPERTY INTEREST.

In Board of Regents of State Colleges v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), the facts showed Roth was hired for a term of one academic year as an assistant professor at a state university. When, at the end of his term, he was informed without reason that he would not be rehired for the next academic year, Roth claimed that the failure to give him notice of the reasons for his nonretention and an opportunity for a hearing was in violation of his right to procedural due process. The Supreme Court held that there was no deprivation of a property interest in continued employment because the terms of his employment specifically provided for only a one-year term. More importantly, the Court held that "nor significantly was there any state statute or University rule or policy that secured his interest in re-employment or that crated any legitimate claim to it." Roth, 408 U.S. 564, 578, 33 L.Ed.2d at 561 (emphasis added). Because he was not tenured, he was not entitled to the statutory procedural rights that tenured professors are entitled to. Further, university rules only provided for notice and hearing of nontenured faculty when they were discharged before their term had expired, thus Roth was not entitled to those procedural protections either. Justice Stewart, in writing the opinion of the Supreme Court, defined the standard in determining what is a protectible property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead have a legitimate claim of entitlement to it.
>
> Property interests are not created by the Constitution. Rather, they are created and defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Roth, 408 U.S. 567, 577, 33 L.Ed.2d at 560. (emphasis added).

Roth's companion case, Perry v. Sindermann, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972), clarified the Roth rule. In Sindermann, a nontenured state college professor who had been employed in the college system for ten years, the last four as a junior college professor under a series of written one-year contracts, was declined re-employment without notice or hearing. Sindermann also claimed that the lack of notice and hearing violated his procedural due process rights. The Supreme Court held that although a subjective expectancy of tenure is not protected, proof that the college had a defacto tenure policy, arising from rules and understandings officially promulgated (emphasis added), would entitle him to procedural protections of notice and hearing. The Court ultimately found no property interest to exist and Justice Stewart, again writing for the Court, stated:

> Not only are property interests created by

> state law, but they can also be created by a broad range of interests that are secured by existing rules or understandings. Property interests are not limited by a few rigid, technical forms, but agreements can be implied from the promisor's words or conduct in light of the surrounding circumstances. Sindermann, 408 U.S. 593, 602, 33 L.Ed.2d at 580.

The River Falls School District's personnel policy clearly specifies that the Board of Education was obligated to provide a non-certified staff employee (such as Vorwald) with written notice of the grounds for termination and an opportunity to be heard, before terminating such employee. (A-27). This school district's policy, under Sindermann and Roth, creates a property interest. The policy was an existing rule or understanding stemming from an independent source that secured certain benefits for Curtis Vorwald and that supported his claim of entitlement to those benefits.

In the case of Oddsen v. Bd. of Fire and Police Commissioners for the City of Milwaukee, 108 Wis.2d 143, 321 N.W.2d 161 (1982), the Wisconsin Supreme Court, citing Roth, stated that public employment was a property interest. Oddsen, 321 N.W.2d at 170. However, in its decision below, the Wisconsin Supreme Court overruled that language. Then, contrary to this Court's decisions in Roth and Sindermann, the Wisconsin Supreme Court held that the River Falls Public School District's personnel policy did not create a property in petitioner's employment. The Wisconsin Supreme Court held that property interests can only be created by "civil service regulations or laws, or a contract or collective bargaining

agreement." Vorwald v. School District of River Falls, et seq., 167 Wis.2d 549, 482 N.W.2d 93 (1992). (A-9).

Four years ago in reversing a decision of the Wisconsin Supreme Court, this Court held in Felder v. Casey, 487 U.S. 131, 108 S. Ct. 2302, 101 L.Ed.2d 123 (1988), that the "supremacy clause imposes on state courts a Constitutional duty to proceed in such a manner that all substantial rights of the parties under controlling federal law are protected." 108 S.Ct. at 2313 (citations omitted).

The Wisconsin Supreme Court's ruling below limits the definition of a property interest to areas narrower than the rulings in Bd. of Regents of State Colleges v. Roth and Perry v. Sindermann and contrary to the mandate cited by this Court in Felder v. Casey.

II. THE WRIT SHOULD BE GRANTED BECAUSE THE FEDERAL CIRCUIT COURTS ARE IN CONFLICT ON THE INTERPRETATION OF THIS COURT'S HOLDINGS IN BD. OF REGENTS OF STATE COLLEGES V. ROTH AND PERRY V. SINDERMANN AS THEY APPLY TO IDENTIFYING PROPERTY INTERESTS.

The Roth/Sindermann rule is the standard still used today in determining whether a property interest exists. However, the federal circuit courts are in conflict in interpreting this rule.

Some of the federal circuits, like the Wisconsin Supreme Court, have interpreted this rule very narrowly, only allowing a property interest to exist where it is defined by state law. In a 10th circuit case, Bailey v. Kirk, 777 F.2d 567 (10th Cir. 1985), a police chief challenged the

constitutionality of the city code and personnel policy that allowed discharge or suspension only for cause and provided for notice and hearing only if the suspension was for more than ten days. The court held that the police chief had a protectible property interest that was implicated when he was suspended for four days under the "for cause" provision of the city code. In so holding, the 10th Circuit stated that the "plaintiff's property interest in his employment was created, defined and governed by state law." Bailey, 777 F.2d at 573, citing Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 84 L.Ed.2d 494, 105 S. Ct. 1487 (1985).

Similarly, in an 11th Circuit case, a former lieutenant with the sheriff's department brought a Section 1983 action claiming a deprivation of procedural due process when he was suspended and eventually demoted. Nolin v. Douglas County, 903 F.2d 1546 (11th Cir. 1990). The court stated, citing to Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976)), that "the sufficiency of a person's claim of entitlement to continued employment must be determined by reference to state law... [a]ccordingly, we must analyze the law of Georgia to determine whether Nolin had a property interest in continued employment." Nolin, 903 F.2d at 1553. Since the Georgia statute provided that indefinite hiring contracts, such as this one, are terminable at will, there was no "reasonable expectation of continued employment to form a protectible property interest." Id. However, the full force of this holding is uncertain because the 11th Circuit further states that an employee could show a property interest if he occupies a position from which he can be terminated only for cause with reference to "laws, regulations, or personnel policies." Id. The 11th Circuit is unclear as to whether those personnel policies creating

property interests must also be derived from state law, whether they can create property interests as long as they do not conflict with state law, or whether personnel policies can only be looked at to fill in the blanks or when there is no state law at all.

The 4th, 6th and 9th Circuits have interpreted Roth as allowing a property interest to be defined by other "rules or understandings" rather than being defined solely under state laws such as statutes. More specifically, these courts hold that although a property interest can be defined by state law, it can also be defined by "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth, 408 U.S. 564, 577, 33 L.Ed.2d at 561.

In Bradley v. Colonial Mental Health & Ret. Services, 856 F.2d 703 (4th Cir. 1988), a husband and wife claimed a violation of their procedural due process rights when their employer did not follow its own grievance procedures set forth in its personnel policy. The court held that the standard set forth in the board's personnel manual "vested with the plaintiffs a claim of entitlement to their continued employment that the Fourteenth Amendment insulates from arbitrary deprivation." Bradley, 856 F.2d at 707. The "existence of a personnel policy is not a litmus test for due process [rather] each employment relationship must be examined carefully to determine whether an employer has undertaken an objective obligation to which its employees may justifiably claim entitlement. Bradley, 856 F.2d at 708. The 4th Circuit further stated that "employee manuals are accepted and relied upon by those from whom the employer reaps the fruit of continuing labor." Id. Although the 4th Circuit stated the sufficiency of the claim of entitlement must be

decided with reference to state law, the court found a property interest in an employment manual, without regard to state law. See also Sabet v. Eastern Virginia Medical Authority, 775 F.2d 1266 (4th Cir. 1985)(property interests are created and defined by existing laws, rules or understandings, usually defined by state law, that support enforceable claims of entitlement. Property interests can arise out of informal or implicit rules or understandings [emphasis added]).

In Edinger v. Bd. of Regents, 906 F.2d 1136 (6th Cir. 1990), an associate professor filed a section 1983 claim for violation of his due process rights when he was led to believe he was tenured. The court distinguished this case from Sindermann in that there was no formal tenure policy existing as in Edinger. However, although the court did not find a property interest due to lack of compelling facts, it did recognize that "even where formal tenure system is in place, when a university awards a nontenured employee the prerequisites of tenure and otherwise leads the employee to reasonably believe his employment is permanent, such actions may create a property interest in continued employment." Edinger, 906 F.2d at 1140. See also Thomas-Lazear v. FBI, 851 F.2d 1202 (9th Cir. 1988)(property interests can be created from mutually explicit understandings created by representations of government officials).

Other Circuits, such as the 1st, 5th and 7th, hold that these "rules or understandings" can only be looked at to fill in the blanks or where there is no applicable state law. In Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49 (1st Cir. 1990), the court explained the Sindermann rule as depending on "pockets of uncertainty. Where an employment scheme--whether statutory, contractual or

mixed--is silent on specific points, pocketed with fissures, or infected by a serious strain of ambiguity, an employer's conduct or declarations may quite appropriately be used to fill the gaps." Correa, 903 F.2d at 55. Correa involved an administrative employee that was named to a trust position in Puerto Rico's judicial system. The plaintiff claimed that the letter he received appointing him to a trust position, stating his permanency of employment was dependent on his performance, was an independent source from which a legitimate expectation of continued employment arose, thereby creating a property interest. The court denied his due process claim and held that while "an employer's unilateral declarations, promises or conduct regarding conditions of continued employment might in some circumstances create a legitimate claim of entitlement to job tenure", the facts in this case did not rise to this level, and to hold otherwise, in this case, may disrupt the elaborate civil service system that was in place. Correa, 903 F.2d at 55.

The 7th Circuit also has held that absent a controlling state statute, evidence of a policy or practice upon which a legitimate claim of entitlement can be based may provide a basis for the property right. Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251 (7th Cir. 1985). In Patkus, the court held that although the personnel policy stating that CETA employees could be dismissed only for cause had not been adopted, the policy gave the CETA director a property interest in her continued employment which could not be terminated without due process. Patkus, 769 F.2d 1251. See also Staheli v. Univ. of Miss. 854 F.2d 121 (5th Cir. 1988) (If school had no formal tenure system but set up explicit or implicit conditions then school cannot violate the very agreement that it created without due process).

III. THE DECISION BELOW, AND OTHER SIMILAR HOLDINGS, RAISE SIGNIFICANT DUE PROCESS IMPLICATIONS AND AFFIRMS THE NEED FOR CLARIFICATION BY THIS COURT ON THE SCOPE OF A PROPERTY INTEREST.

It is axiomatic that property interests are important and when one is found to exist, they cannot be deprived without due process. Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 105 S.Ct. 1487 (1985). It is also clear that property interests ought to be defined beyond the confines of state law where appropriate. A close reading of the rule in Roth points this out. The Supreme Court did not state that property interests are derived solely from state law, rather it stated that property interests are defined by sources independent of the Constitution "such as state law or rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Roth 408 U.S. 564, 577, 33 L.Ed.2d at 561 (emphasis added).

Although the implications of this case go beyond employment, this is the area involved in this case. In his dissent in Roth, Justice Marshall stated:

> Employment is one of the greatest, if not the greatest, benefit that governments offer in modern day life. When something as valuable as the opportunity to work is at stake, the government may not reward some citizens and not others without demonstrating that its actions are fair and equitable. It is procedural due process that's our fundamental guarantee of fairness, our protection against arbitrary capricious

and unreasonable government action. Roth, 408 U.S. 564, 589, 33 L.Ed.2d at 568.

The right to work for a living is the "very essence of the personal freedom and opportunity that it was the purpose of the 14th Amendment to secure." Roth, 408 U.S. 564, 588, 33 L.Ed.2d at 567 (Marshall, J., dissenting).

Employment and the right to procedural due process are highly valued in our society. To limit a citizen's due process rights by allowing them to claim a property interest that can only be defined by state law is to ultimately impinge on that right. This is not to say that all employees automatically have a protectible property interest entitling them to notice and hearing prior to termination [2]. However, employees should be able to rely on the protections afforded them under the employer's own discharge policies. This Court has held that "a purpose of the ancient institution of property is to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." Roth, 408 U.S. 564, 577, 33 L.Ed.2d at 561.

Property is a "broad and majestic" term. It is "among the great constitutional concepts . . . purposely left to gather meaning from experience. [It relates] to the whole domain of social and economic fact and the

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[2]However,"[i]t may be argued that to provide procedural due process to all public employees or prospective employees would place an intolerable burden in the machinery of government . . . It can scarcely be argued that government would be crippled by a requirement that the reason be communicated to the person most directly affected by the government's decision." Roth, 408 U.S. 564, 591, 33 L.Ed.2d at 569. (Marshall, J., Dissenting).

statesmen who founded this nation knew only too well that a stagnant society remains unchanged." Bartlett v. Krause, 209 Conn. 352, 55 A.2d 710, 716 (Conn. 1988), citing Nat'l Ins. Co. v. Tidewater Co., 337 U.S. 582, 69 S.Ct. 1173, 93 L.Ed. 1556 (1949)(Frankfurter, J., dissenting)(other citations omitted). Furthermore, "due process is flexible and calls for such procedural protections as the particular situation demands." Bartlett, citing Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

With these basic underlying principles of property interests and the due process clause in mind, and the conflict among the federal and state courts as to what constitutes a property interest, the Supreme Court needs to step in and clarify under what circumstances a property interest in employment exists. If this important principle is not clarified, courts such as the Wisconsin Supreme Court will continue to narrowly construe the circumstances under which a property interest may be created, in direct conflict with the parameters set forth in Sindermann and Roth.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Wisconsin Supreme Court.

Respectfully submitted,

August, 1992.

DAVISON & VLACK

*Edward F. Vlack III
John M. O'Boyle
Attorneys for Petitioner
200 East Elm Street
River Falls, Wisconsin 54022
Telephone: (715) 425-1525

*Counsel of Record

APPENDIX

SUPREME COURT
OF WISCONSIN
P.O. BOX 1688
MADISON, WI 53701-1688

REMITTITUR

APPEAL NO. 90-1908-FT

T.Ct. NO. 89-CV-128

Curtis R. Vorwald,
Plaintiff-Appellant,
v.
School District of River Falls,
River Falls Board of Eduction,
and Charles R. Brenden,
Superintendent of Schools,
Defendants-Respondents-Petitioners.

This cause was an appeal to review the judgment of the circuit court of Pierce County. Upon consideration, it is ordered and adjudged by an opinion filed on April 10, 1992, that:

The decision of the court of appeals is reversed.

Shirley S. Abrahamson Wrote Concurring Opinion
Louis J. Ceci Wrote Decision/Opinion

The appeal record is hereby returned to the Clerk of Circuit Court for Pierce County.

I certify that the above is a correct transcript of the original order and judgment of the court in the above-entitled cause.

Dated:
June 02, 1992.

/S/MLG

Marilyn L. Graves
Clerk, Supreme Court

Curtis R. VORWALD, Plaintiff-Appellant,†

v.

SCHOOL DISTRICT OF RIVER FALLS, River Falls Board of Education and Charles R. Brenden, Superintendent of Schools, Defendants-Respondents-Petitioners.

Supreme Court

No. 90-1908-FT. Oral argument January 23, 1992.—Decided April 10, 1992.

(Reversing 160 Wis. 2d 536, 466 N.W.2d 683 (Ct. App. 1991).)

(Also reported in 482 N.W.2d 93.)

REVIEW of a decision of the Court of Appeals. *Reversed.*

For the defendants-respondents-petitioners there were briefs by *Cassandra B. Westgate* and *Terwilliger, Wakeen, Piehler & Conway, S.C.*, Wausau and oral argument by *Ms. Westgate.*

For the plaintiff-appellant there was a brief by *Edward F. Vlack, John M. O'Boyle* and *Davison & Vlack*, River Falls and oral argument by *Edward F. Vlack.*

LOUIS J. CECI, J. This case is before the court on petition for review of a published decision of the court of appeals, *Vorwald v. River Falls School Dist.*, 160 Wis. 2d 536, 466 N.W.2d 683 (Ct. App. 1991), reversing a summary judgment by the circuit court for Pierce County, Robert W. Wing, Circuit Judge. The circuit court dismissed Curtis R. Vorwald's (Vorwald) 42 U.S.C. sec. 1983 (sec. 1983) claim because the court determined that Vorwald's exclusive remedy was under the Wiscon-

sin Worker's Compensation Act, secs. 102.01-102.89, Stats. (WCA). The court of appeals reversed, finding that the WCA does not bar a sec. 1983 claim when the state terminates an employee without adequate notice and an opportunity to respond. *Vorwald*, 160 Wis. 2d at 539. Because we find that Vorwald was an employee at will and therefore had no substantive right to continued employment, we reverse the court of appeals.

The relevant facts are not in dispute. Vorwald was a custodian for the school district of River Falls (the school district). Prior to his termination, Vorwald suffered a work-related injury which resulted in his no longer being able to wet-mop or to lift anything weighing more than 20 pounds. At a meeting of the school board (the board) on September 19, 1988, the board's personnel committee recommended to the board that Vorwald's employment be terminated, due to Vorwald's work restrictions. Based on that recommendation, the full board then voted to terminate Vorwald's employment. Vorwald was present at the meetings of both the board and the personnel committee. Vorwald filed a summons and complaint in circuit court on April 26, 1989, alleging that his termination violated 42 U.S.C. sec. 1983.

[1, 2]

Whether Vorwald has a valid sec. 1983 claim is a question of law. We decide questions of law without deference to the decisions of the lower courts. *Pulsfus Farms v. Town of Leeds*, 149 Wis. 2d 797, 803-04, 440 N.W.2d 329 (1989).

Vorwald's complaint alleged a violation of procedural due process. A sec. 1983 action may be brought for a violation of procedural due process. *Zinermon v. Burch*, 494 U.S. 113, 125 (1990). However, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amend-

ment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). As the court of appeals correctly stated, "If Vorwald has a property right in his employment, the state cannot deprive him of this right without due process." *Vorwald*, 160 Wis. 2d at 542. We must therefore examine whether Vorwald has a property interest in his employment.

The court of appeals did not address the issue of whether Vorwald had a property interest in his employment. Rather, the court of appeals stated: "The school district maintains that Vorwald has no recognizable property interest in his employment. Because this issue is neither argued nor briefed, we decline to address it." *Vorwald*, 160 Wis. 2d at 542 n.3. The school district maintains that it argued Vorwald's lack of a property interest in his employment at both the circuit court and the court of appeals. We agree with the school district that the issue of whether Vorwald has a property interest in his employment has been argued continuously from the inception of the case.

The amended answer filed in circuit court by the school district states: "Plaintiff has failed to state a claim upon which relief can be granted because the Complaint does not set forth any cognizable deprivation of any rights, privileges or immunities extended by the United States Constitution or the Constitution of the State of Wisconsin." Additionally, in its Notice of Motion and Motion for Summary Judgment, the school district argued that "*the Plaintiff has no cognizable property interest under Wisconsin law which is required for the Plaintiff to prevail under Section 1983*" (emphasis added). Furthermore, in its brief in support of its motion for summary judgment, the school district argued:

> [Vorwald] cannot claim that he had any right to continued employment, which is what is required to demonstrate a property interest, because the Worker's Compensation Act has usurped the field . . . and has set forth exactly what rights an injured worker has in his employment.
>
> *Accordingly, Plaintiff's claim for violation of a due process right must fail where no property interest can be shown under Wisconsin law.*

(Emphasis added.) Finally, in its reply brief in support of its motion for summary judgment, the school district concluded:

> [G]iven the existence and applicability of the exclusive remedy provisions under the Worker's Compensation Act and alternatively, the Wisconsin Fair Employment Act, the interest which [Vorwald] claims in his job right would not amount to entitlement under the facts of this case. *Contrary to [Vorwald's] claim that public employment in and of itself creates a property interest in Wisconsin, employment at will is the rule absent a showing of entitlement or some enforceable basis for a continued expectation of employment.*

(Emphasis added.) The above excerpts from the circuit court record show that the issue of whether Vorwald had a property interest in his employment was raised and argued by the school district at the circuit court level.

[3]

In the school district's brief before the court of appeals, the school district argued:

> *[Vorwald] has no recognizable property interest in employment under Wisconsin's laws;* and that even if he did, the availability of a Worker's Compensation Hearing provides adequate due process . . ..

. . . .

> What the [school district is] saying is that *the facts of this case are based upon a property interest in employment; that such a property interest is determined by reference to interest created and enforceable under State law; and that there is no interest that is enforceable under State law in this case* because of the operation of the Worker's Compensation Act. . . .
>
> . . .
>
> The exclusivity provisions of that Act operate to preclude any enforceable property interest in employment, which is a necessary basis for a procedural due process claim.

(Emphasis added.) As the above excerpts illustrate, the school district's argument at the court of appeals focused upon whether the operation of the WCA precluded the existence of an enforceable property interest in employment. However, the arguments address the general issue of whether Vorwald had a property interest in his employment.[1] We therefore find that the issue of whether Vorwald had a property interest in his employment was also raised before the court of appeals. Accordingly, the school district is not raising this issue for the first time on appeal, as Vorwald contends. We therefore believe that the court of appeals should have addressed this issue.

[4]

The school district argues that Vorwald had no property interest for two reasons: (1) He was an employee at will, and (2) the applicability of the WCA precludes the existence of an enforceable entitlement to

[1]For a discussion of the difference between issues and arguments, see *State v. Weber*, 164 Wis. 2d 788, 789-91, 476 N.W.2d 867 (1991) (on motion for reconsideration).

continued employment. We agree with the school district that Vorwald was an employee at will and, therefore, do not reach the issue of whether the WCA can preclude the existence of an enforceable entitlement to continued employment.

Vorwald asserts that he had a property interest in his employment due to this court's decision in *Oddsen v. Board of Fire & Police Comm'rs*, 108 Wis. 2d 143, 159, 321 N.W.2d 161 (1982), where we stated that "[p]ublic employment is a property right." Vorwald also argues that he had a property interest in his employment due to the board's personnel policy No. 4210,[2] which he argues either created a contract under *Holloway v. K-Mart Corp.*, 113 Wis. 2d 143, 334 N.W.2d 570 (Ct. App. 1983), or provided "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits," under *Roth*, 408 U.S. at 577.

In determining whether Vorwald had a property interest in his employment, we look to state law.

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[2]The board's personnel policy No. 4210 provides in relevant part as follows:

> The Board may dismiss any non-certified employee upon recommendation by the superintendent. The superintendent shall specify the grounds for the dismissal in a written statement, which shall be filed with the Board. Any non-certified employee may be dismissed for those causes which are specified in Administrative Procedure No. 4210.a, although the causes set forth in that procedure are not intended to be exclusive.
>
> Upon receipt of the superintendent's recommendation relating to the dismissal of any non-certified employee, the Board shall provide the employee with written notification of the proposed dismissal, along with a statement of the grounds for the proposed dismissal. Such notification shall also advise the employee of his or her right to a hearing on the question of the proposed dismissal. No non-certified employee may be dismissed except by a majority vote of those Board members present when such a vote is taken.

Vorwald apparently was a "non-certified employee."

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id.

[5–7]

Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment. *See Castelaz v. Milwaukee*, 94 Wis. 2d 513, 520, 289 N.W.2d 259 (1980); *Adamczyk v. Caledonia*, 52 Wis. 2d 270, 273-74, 190 N.W.2d 137 (1971); *accord Amendola v. Schliewe*, 732 F.2d 79, 83 (7th Cir. 1984); *compare Hough v. Dane County*, 157 Wis. 2d 32, 40-42, 458 N.W.2d 543 (Ct. App. 1990) (statutes may provide an entitlement to employment).

Vorwald's argument that our decision in *Oddsen* changed the general rule of employment at will for public employees is misplaced. In *Oddsen*, the Chief of the Milwaukee Police Department directed that two Milwaukee police officers be discharged. Pursuant to sec. 62.50(13), Stats., the Chief filed a complaint with the Board of Fire and Police Commissioners, setting forth the reasons for the discharge. Due to the protection afforded them by statute, the police officers in *Oddsen* had property interests in their employment. Although we stated in *Oddsen* that "[p]ublic employment is a property right," *Oddsen*, 108 Wis. 2d at 159, we should have qualified that statement to say that public employment is a property right for those public employees given tenure by operation of civil service regulations or laws. *Oddsen* was not meant

to and in no way altered Wisconsin's long-standing rule of employment at will.

[8]

In addition, based on the record before us, we find that the school district's personnel policy No. 4210 did not alter Vorwald's employee-at-will status. In some limited circumstances, employee handbooks and personnel policies can abrogate the employment-at-will relationship. *See Ferraro v. Koelsch*, 124 Wis. 2d 154, 157-58, 368 N.W.2d 666 (1985); *Holloway*, 113 Wis. 2d at 146. However, the single personnel policy standing alone in this case, without any evidence indicating that Vorwald and the school district agreed to be bound by the terms of the policy, does not rise to the level of a contract, either implied or otherwise. Therefore, the school district's "common-law right to discharge an employee at any time without cause was not limited by its self-imposed policies regarding discharge." *Holloway*, 113 Wis. 2d at 146.

[9]

Furthermore, because we find that the personnel policy did not abrogate Vorwald's employee-at-will status, the policy does not rise to the level of "rules or understandings that stem from an independent source such as state law" that are required to "support claims of entitlement" under *Roth*, 408 U.S. at 577.

Because we find the issue of whether Vorwald had a property interest in his employment controlling in this case, we do not address the remaining issues raised by the parties.

By the Court.—The decision of the court of appeals is reversed.

SHIRLEY S. ABRAHAMSON, J. *(concurring).* I do not join the majority opinion's holding that the court

of appeals should have addressed the issue of whether Vorwald had a recognizable property interest in his employment. Majority opinion at 556. I conclude, as did the court of appeals, that the school district mentioned the recognizable property interest issue in passing, without developing the issue in the court of appeals brief.[1] Because the school district did not brief the issue in the court of appeals, I conclude that the court of appeals, in its discretion, could have declined to address this issue.[2] The court of appeals has similarly exercised its discretion in a number of cases.[3] Indeed, even if a party does

[1]The opinion of the court of appeals states: "The school district maintains that Vorwald has no recognizable property interest in his employment. Because this issue is neither argued nor briefed, we decline to address it. *See In re Balkus*, 128 Wis. 2d 246, 255 n. 5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985)." *Vorwald v. River Falls School Dist.*, 160 Wis. 2d 536, 542 n.3, 466 N.W.2d 683 (Ct. App. 1991).

[2]The court of appeals, in its discretion, also could have addressed the issue or asked for supplemental briefs.

So that the reader may evaluate the court of appeals' decision not to address the issue, I have quoted at note 7 the school district's full discussion of its claim that Vorwald has no recognizable property interest in employment.

[3]See, *e.g.*, *In the Interest of J.A.B.*, 153 Wis. 2d 761, 769, 451 N.W.2d 799 (Ct. App. 1989) (appellant "does not develop that argument, however, nor does she refer us to any authority to shore up her assertions. . . . Consequently, we deem the issue abandoned."); *Polan v. Department of Revenue*, 147 Wis. 2d 648, 660, 433 N.W.2d 640 (Ct. App. 1988) ("We deem abandoned a position turning on a point of law known to exist but not briefed or argued."); *In re Balkus*, 128 Wis. 2d 246, 254, 381 N.W.2d 593 (Ct. App. 1985) (claimant "cites no cases or authority in support of her argument. In light of the inadequate briefing of this issue we decline to address it."); *Reiman Associates v. R/A Advertising*, 102 Wis. 2d 305, 306, n.1, 306 N.W.2d 292 (Ct. App. 1981) ("In

brief the issue, an appellate court has discretion not to decide the issue. Our court has picturesquely written: "An appellate court is not a performing bear, required to dance to each and every tune played on an appeal." *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978).

This court does not generally review the court of appeals' exercise of discretion,[4] and I would not do so in

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their notice of cross-appeal, plaintiffs specified as objectionable that portion of the judgment dismissing with prejudice their complaint against the individual defendants. That issue has not been briefed or argued on appeal, and we deem it abandoned.") *State v. Shaffer*, 96 Wis. 2d 531, 546, 292 N.W.2d 370 (Ct. App. 1980). ("The argument is supported merely by a general citation to four pages from the record where the trial court denied a motion to strike concerning this unspecified earlier testimony. Such an appellate argument is inadequate and does not comply with sec. 809.19(1)(e), Stats. In the future this court will refuse to consider such an argument, or summarily affirm on this issue. Section 809.83(2).")

Section 809.19(1)(e), Stats. 1989-90, provides in part:

> (1) The brief must contain:
>
> (e) An argument arranged in the order of the statement of issues presented. The argument on each issue must be preceded by a one sentence summary of the argument and is to contain the contention of the appellant, the reasons therefor, with citations to the authorities, statutes and parts of the record relied on as set forth in the Uniform System of Citation.

Section 809.83(2), Stats. 1989-90, provides:

> (2) Noncompliance with rules. Failure of a person to comply with a requirement of these rules, other than the timely filing of a notice of appeal or cross-appeal, does not affect the jurisdiction of the court over the appeal but is grounds for dismissal of the appeal, summary reversal, striking of a paper, imposition of a penalty or costs on a party or counsel, or other action as the court considers appropriate.

[4] *State v. McConnohie*, 113 Wis. 2d 362, 368-69, 334 N.W.2d

this case.[5] Nor would I criticize the court of appeals explicitly or implicitly for failing to address an issue (or if you prefer, for failing to address an argument)[6] not briefed in that court.

The majority opinion places a significant burden on the court of appeals by holding, in effect, that the court of appeals errs when it fails to address every issue or argument a party's brief may mention in passing. This is a burden no court can manage.

I believe the appellate practice rules applicable to this case can be summarized briefly as follows:

Issue Must Be Preserved. If a litigant wants an appellate court to decide an issue as a matter of right, the party must preserve the legal issue for appellate review

903 (1983); *Aparacor, Inc. v. ILHR Dep't*, 97 Wis. 2d 399, 404, 293 N.W.2d 545 (1980).

[5]I add, however, that the court of appeals declination to review this unbriefed issue makes good sense. Because neither the circuit court nor the court of appeals addressed the issue of Vorwald's recognizable property interest, the parties could have addressed that issue in circuit court on remand. Indeed, Vorwald argues in this court that the intent and practice of the parties regarding the employment contract is an issue of fact that should be decided at trial.

[6]I use the word *issue*, but the reader may, if he or she wishes, substitute the word *argument*. I do not find the majority's distinction between "argument" and "issue" helpful because the distinction depends on the level of generality used to state the issue. See *State v. Weber*, 164 Wis. 2d 788, 793-95, 476 N.W.2d 867 (1991) (on motion for reconsideration) (Abrahamson, J., dissenting).

The litigants decide what issues or arguments they will address in the circuit or appellate courts, although a court may consider issues (or arguments) the parties do not address. The litigants may frame the legal issue in broad or narrow terms.

by adequately alerting the circuit court and the appellate court to the issue.

Appellate Courts' Discretion. The court of appeals and this court have the power to address issues even if the parties fail to preserve these issues in the circuit court or fail to address them in the petition for review to the supreme court or in their appellate court briefs.

Court of Appeals. If an appellant wants the court of appeals to address an issue, the appellant must brief the issue in the court of appeals. If the *appellant* mentions the issue in passing but does not brief it, the court of appeals may decline to address the issue. Even if the appellant briefs an issue, the court of appeals need not decide the issue if it concludes another issue is determinative.

In this case the majority opinion states the issue as whether Vorwald had a recognizable property interest in his employment; the majority looks to the terms of the employment contract for the answer. As is clear from the excerpts of the school district's briefs appearing in the majority opinion (554-555), the school district chose to present a different issue to the courts. It briefed only the issue of whether the Worker's Compensation Act deprived Vorwald of any property right.

Although the school district's brief in the court of appeals "maintains" that Vorwald had no recognizable property interest in employment, the brief never explains on what basis the district "maintains" this position. The brief discusses only the effect of worker's compensation on Vorwald's claim.[7]

[7] I quote below in full those parts of the school district's brief in the court of appeals that refer to the recognizable property interest issue.

The school district's brief (p. 3) in the court of appeals states:

The determination of whether the Appellant [Vorwald] has a prop-

The school district's brief in this court concedes that the district presented only the worker's compensation issue to the court of appeals. The district describes the issues it presented to the court of appeals as follows: "The issues on appeal [before the court of appeals] were

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erty interest deserving a constitutional due process protection is primarily dependent on the recognition of such an interest under State law. [Citations omitted.] Therefore, a public employee must have an enforceable expectation of continued employment under State law to trigger the due process requirement of pre-determination notice and hearing. [Citations omitted.]

The school district's brief (p. 5) in the court of appeals continues:

> *Respondents [school district] maintain that Appellant [Vorwald] has no recognizable property interest in employment under Wisconsin's laws;* and that even if he did, the availability of a Worker's Compensation Hearing provides adequate due process. . . . (Emphasis added.)

The school district's brief (pp. 8-9) in the court of appeals concludes its Worker's Compensation Act analysis as follows:

> In this case, Curtis Vorwald claims he was denied notice and an opportunity for a hearing regarding his employment termination; there is no dispute that the termination arose under the Worker's Compensation Act. The Respondents [the school districts] are not claiming that the Worker's Compensation Act, or any other State legislation, can preclude substantive Federal constitutional claims. *What the Respondents are saying is that the facts of this case are based upon a property interest in employment, that such a property interest is determined by reference to interest created and enforceable under state law, and that there is no interest that is enforceable under State law in this case because of the operation of the Worker's Compensation Act.* Appellant's claim for deprivation of due process based on property interest in employment must fail where the Worker's Compensation Act is applicable and provides the exclusive remedy for the Appellant's claim of right. (Emphasis added.)

The remainder of the school district's brief discusses the Worker's Compensation Act and the necessity of exhausting administrative remedies.

the operation of the exclusivity provision of the Worker's Compensation Act; the exhaustion requirement; and post deprivation due process." School District's Supreme Court Brief at 2-3.

Supreme Court. If a petitioner wants to have the supreme court address an issue upon the court's granting the petition for review, the petitioner must set forth the issue in the petition for review. Section (Rule) 809.62(6), Stats. 1989-90, provides that "if the petition is granted, the petitioner cannot raise or argue issues not set forth in the petition unless ordered otherwise by the supreme court. . . ."

In its petition for review (p. 2), the school district stated the issue as follows: "When determining the existence of a constitutionally protected interest in employment, does the applicability of a State Worker's Compensation Act to the issues of the case preclude the existence of an enforceable entitlement to employment?" The school district's petition for review, like the presentation in the circuit court and the court of appeals, limited the discussion of Vorwald's recognizable property interest to the issue of whether the Worker's Compensation Act deprives the employee of a property interest.

Despite the deficiency in the petition for review, I believe this court should exercise its discretion to reach the issue of Vorwald's recognizable property interest. The parties' briefs in this court touch on the issue.[8] If the parties believe the court has failed to consider the recognizable property interest fully, the remedy is a motion for reconsideration.

[8]See *Waushara County v. Graf*, 166 Wis. 2d 442, 462, 480 N.W.2d 16 (1992).

For the reasons set forth, I write separately and concur in the mandate.

Curtis R. VORWALD, Plaintiff-Appellant,

v.

SCHOOL DISTRICT OF RIVER FALLS, River Falls Board of Education, and Charles R. Brenden, Superintendent of Schools, Defendants-Respondents.†

Court of Appeals

No. 90-1908-FT. Submitted on briefs December 10, 1990.—Decided January 29, 1991.

(Also reported in 466 N.W.2d 683.)

APPEAL from a judgment of the circuit court for Pierce county: ROBERT W. WING, Judge. *Reversed and cause remanded with directions.*

On behalf of the plaintiff-appellant the cause was submitted on the briefs of *Edward F. Vlack* of *Davison & Vlack* of River Falls.

On behalf of the defendants-respondents the cause was submitted on the brief of *Cassandra B. Westgate* of *Terwilliger, Wakeen, Piehler & Conway, S.C.* of Wausau.

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Curtis Vorwald appeals a judgment dismissing his 42 U.S.C. sec. 1983 claim against his former employer for terminating Vorwald's employment without adequate notice and a fair hearing in violation of his procedural due process rights.[1] The court dismissed Vorwald's sec. 1983 claim because it concluded that Wisconsin's Worker's Compensation Law provided the exclusive remedy for Vôrwald. Because the exclusivity of the Worker's Compensation Law does not bar a sec. 1983 claim when the state terminates an employee without adequate notice and an opportunity to respond, we reverse.

The school district of River Falls, Wisconsin, employed Vorwald as a custodian for almost eighteen years. In August 1987, Vorwald suffered a job-related injury. Vorwald returned to work with restrictions placed upon him by his physicians. In September 1988, the board of education elected to terminate Vorwald's employment based upon the recommendation of the personnel committee. Vorwald previously filed a worker's compensation claim for his work-related injury, and the parties agreed to payment for the injury. The agreement reserved Vorwald's right to bring a claim based upon the employer's wrongful refusal to rehire under sec. 102.18(4)(a), Stats.

Vorwald, however, filed a sec. 1983 claim alleging that the board terminated him without adequate notice and without due process. The circuit court concluded

[1]This is an expedited appeal under Rule 809.17.

that an exclusive state remedy existed for resolution of Vorwald's claim and granted summary judgment dismissing his claim.

[1–3]

A trial court's decision to grant or deny summary judgment will not be reversed on appeal unless the trial court abuses its discretion. *Jones v. Sears Roebuck & Co.*, 80 Wis. 2d 321, 325, 259 N.W.2d 70, 71 (1977). A decision based on a mistaken view of the law constitutes an abuse of discretion. *Schmid v. Olsen*, 111 Wis. 2d 228, 237, 330 N.W.2d 547, 552 (1983). Because Vorwald was entitled to notice and a meaningful opportunity to respond *before* he was terminated, and because post-termination state remedies would not cure any alleged violation of this right, the trial court erred by concluding that the Worker's Compensation Act provided the exclusive remedy.

[4–9]

We begin our analysis with a brief review of relevant sec. 1983 law. Three types of sec. 1983 claims may be brought under the due process clause of the fourteenth amendment. First, a plaintiff may bring a claim for violations of specific rights protected by the Bill of Rights and incorporated by the due process clause. *Zinermon v. Burch*, 110 S. Ct. 975, 983 (1990). Second, the due process clause itself has a substantive component that bars arbitrary government action. *Id.* Any violation actionable as one of these two types of sec. 1983 claims is complete when the violation occurs. *Zinermon*, 110 S. Ct. at 983. Accordingly, state law remedies do not preclude a plaintiff from bringing a sec. 1983 action based on such violations. *Zinermon*, 110 S. Ct. at 983. Finally, a plaintiff may bring a sec. 1983 action for a violation of procedural due process. In such cases, the alleged unconstitutionality of the state action involves the deprivation of

"life, liberty, or property" without due process of law. The deprivation itself is not unconstitutional. *Zinermon*, 110 S. Ct. at 983 (citing *Parratt v. Taylor*, 451 U.S. 527, 537 (1981)).

[10]

Unlike the first two types of sec. 1983 due process claims, the availability of state remedies may be relevant to procedural due process actions. Referring to such actions, the *Zinermon* court stated, "[t]he constitutional violation actionable under sec. 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process." *Zinermon*, 110 S. Ct. at 983. In determining whether a procedural due process violation actionable under sec. 1983 has occurred, we must ask whether the process provided by the state was constitutionally adequate. *Zinermon*, 110 S. Ct. at 983.

In *Parratt*, the court held that post-deprivation state law remedies precluded the plaintiff's sec. 1983 claim. In that case, a prisoner brought a sec. 1983 action after prison employees negligently lost materials he had mail-ordered.[2] The court reasoned that no predeprivation procedural safeguard could address the risk of this type of deprivation. *Parratt*, 451 U.S. at 543. When a random and unauthorized act causes the deprivation and the state cannot precisely predict when the deprivation will occur, the state is unable to provide a meaningful hearing prior to the deprivation. *Id.* However, where the state can provide a meaningful predeprivation hearing, it must generally do so regardless of the adequacy of a post-deprivation state law remedy. *Zinermon*, 110 S. Ct. at 987.

[2]State officials' negligent acts no longer give rise to sec. 1983 liability. *Daniels v. Williams*, 474 U.S. 327, 336 (1986) (overruling that part of the *Parratt* decision).

[11]

Vorwald claims the school board violated his procedural due process rights by terminating his employment without notice and a hearing. If Vorwald has a property right in his employment, the state cannot deprive him of this right without due process.[3] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). At a minimum, due process requires that the state provide notice and an opportunity to respond prior to termination. *Id.* at 546. Thus, by alleging that he had a property interest in his employment and that the school board deprived him of this interest without adequate notice and opportunity to respond, Vorwald alleged a violation of his procedural due process rights sufficient to maintain a sec. 1983 action. Because the state could provide notice and a meaningful opportunity to respond prior to Vorwald's termination, the existence of post-termination state law remedies is not a defense to Vorwald's sec. 1983 claim.

Our analysis is consistent with that of the Seventh Circuit Court of Appeals in *Schultz v. Baumgart*, 738 F.2d 231 (1984). That case involved a discharged Wisconsin fire fighter who brought a sec. 1983 action claiming he was discharged in violation of due process. The court held that the discharged employee must first establish his property interest in continued employment. *Id.* at 234. The employee must then demonstrate that the employer discharged him in violation of due process protections. *Id.* at 235. At a minimum, these protections include notice and "a meaningful opportunity to respond

[3]The school district maintains that Vorwald has no recognizable property interest in his employment. Because this issue is neither argued nor briefed, we decline to address it. *See In re Balkus*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593, 598 n.5 (Ct. App. 1985).

prior to termination." *Id.* (Citations omitted.) The court then stated:

> For purposes of remand, we note that if Schultz was indeed fired in violation of his due process rights, the availability of *post-deprivation* grievance procedures or a board hearing would not have cured the violation. Schultz was entitled to notice and a meaningful opportunity to respond *before* he was terminated. If he was terminated without those protections, the constitutional deprivation was then complete. Schultz need not have exhausted other state remedies before bringing his section 1983 claim.

Id. at 237. (Emphasis in original.)

The school district argues that a refusal to rehire hearing under sec. 102.35(3) of the Worker's Compensation Act is an exclusive remedy that provides adequate post-deprivation procedural due process. If Vorwald was terminated without due process, however, the availability of post-deprivation remedies would not cure the violation because post-deprivation remedies do not address the due process violation. The worker's compensation remedy addresses the wrongful failure to rehire, not the failure to grant the employee due process. Moreover, the exclusivity provision in a state worker's compensation act cannot preclude recovery on a valid sec. 1983 claim because the federal remedy provided by sec. 1983 supersedes conflicting state law. *Rosa v. Cantrell*, 705 F.2d 1208, 1220 (1982). Wisconsin cannot abolish federally-granted sec. 1983 claims by creating an exclusive remedy in its worker's compensation statute.

[12]

The district also contends that a predeprivation hearing on the issue of termination is neither feasible nor practical where the termination is based on workplace injury. We disagree. The fact that termination is

based on workplace injury does not bear on the feasibility of providing pretermination notice and an opportunity to respond. In *Schultz*, the discharged employee was on paid sick leave prior to termination. That court noted that the case involved a "garden variety" dismissal, and the city easily could have provided predeprivation procedural protections. The same is true in the instant case.

The district argues that the failure to follow the due process procedure was random and unauthorized, and, thus, the *Parratt* rule applies. The district essentially argues that because any violation of an employee's due process right to pretermination notice and a meaningful opportunity to respond is by definition random, unauthorized and hard to predict, the employee cannot bring a sec. 1983 action if adequate state law post-deprivation remedies are available. Such a holding would render sec. 1983 rights meaningless and would be directly contrary to the holdings of *Zinermon* and *Loudermill*. These cases hold that the ability to offer due process and not the random nature of the state's conduct is determinative of this issue.

Finally, the district argues that even if worker's compensation does not provide the exclusive remedy, Vorwald must exhaust available administrative remedies before bringing a sec. 1983 action. In *Kramer v. Horton*, 128 Wis. 2d 404, 419, 383 N.W.2d 54, 60 (1986), the Wisconsin Supreme Court held that a reassigned University of Wisconsin tenured professor had to exhaust administrative remedies before bringing a sec. 1983 claim in state court. The court reasoned that the exhaustion doctrine provided agencies with the opportunity to correct their own mistakes, promoted judicial efficiency and developed a more complete factual record. *Id.* at 418, 383 N.W.2d at 59-60.

Kramer appears to be in conflict with *Felder v. Casey*, 108 S. Ct. 2302 (1988), which held that Wisconsin state courts could not impose Wisconsin's notice of claim statutes on sec. 1983 actions. However, we need not reach that issue because in the present case Vorwald had no administrative remedy. The school district provided no review of the board's actions. Unlike the plaintiff in *Kramer*, who could have sought review by the university's executive committee, chancellor and ultimately the board of regents, Vorwald had no administrative tribunal from which to seek further review.

The worker's compensation hearing examiner may review an employer's refusal to rehire an injured employee and may award that employee up to one year's lost wages. Section 102.35(3), Stats. However, the worker's compensation forum is not competent to review Vorwald's claimed denial of a due process hearing. Also, as noted by the *Kramer* court, a key policy behind the exhaustion doctrine is providing the agency an opportunity to correct its own mistake. Unlike the university system in *Kramer*, worker's compensation does not provide the next level of review of a school district's termination decisions. Rather, a worker's compensation wrongful refusal to rehire takes the place of a claim for tortious refusal to rehire. *See Cornejo v. Polycon Indus.*, 109 Wis. 2d 649, 327 N.W.2d 183 (Ct. App. 1982).

On remand the trial court must try Vorwald's claim that he was denied procedural due process because he did not receive notice and a due process hearing prior to termination. The substantive due process claim of wrongful termination is not before us and, thus, we do not address it.

By the Court.—Judgment reversed and cause remanded with directions.

Personnel 4210

Dismissal of Non-Certified and Support Staff Personnel

It shall be the policy of the Board of Education of the River Falls School District to strive to assist personnel in every way possible to adjust to their positions and to perform their duties satisfactorily. Every reasonable effort shall be made to avoid the necessity of dismissing personnel.

The Board may dismiss any non-certified employee upon recommendation by the superintendent. The superintendent shall specify the grounds for the dismissal in a written statement, which shall be filed with the Board. Any non-certified employee may be dismissed for those causes which are specified in administrative Procedure No. 4210.a, although the causes set forth in that procedure are not intended to be exclusive.

Upon receipt of the superintendent's recommendation relating to the dismissal of any non-certified employee, the Board shall provide the employee with written notification of the proposed dismissal, along with a statement of the grounds for the proposed dismissal. Such notification shall also advise the employee of his or her right to a hearing on the question of the proposed dismissal. No non-certified employee may be dismissed except by a majority vote of those Board members present when such a vote is taken.

On or before June 30 of the academic year during which a non-certified employee is employed by the River Falls School District, the Board shall give such an

employee written notice of the refusal to renew that individual's employment for the ensuing year. This notice shall also advise the employee of his or her right to a hearing on the issue of re-employment. In the event such a hearing is held as a result of the employee's request, the Board shall render its decision on the issue of that employee's re-employment within fifteen (15) days after such hearing.

The Board has the right to suspend a non-certified employee from duty against whom formal charges have been filed until a decision is rendered. The employee's salary shall continue during such suspension.

Adopted: 5/17/76

(2)

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No. 92-378

In The

Supreme Court of the United States

October Term, 1992

CURTIS R. VORWALD,

Petitioner,

vs.

SCHOOL DISTRICT OF RIVER FALLS, RIVER FALLS BOARD OF EDUCATION and CHARLES R. BRENDEN, Superintendent of Schools,

Respondents.

On Petition for a Writ of Certiorari to the Wisconsin Supreme Court

RESPONDENTS' BRIEF IN OPPOSITION

THOMAS TERWILLIGER
Counsel of Record
CASSANDRA B. WESTGATE
TERWILLIGER, WAKEEN, PIEHLER & CONWAY, S.C.
Attorneys for Respondents
555 Scott Street
P.O. Box 8063
Wausau, Wisconsin 54402-8063
(715) 845-2121

2738
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Curtis Vorwald, the petitioner, was terminated from his employment on Septemer 18, 1988, following the third of a series of back injuries. Mr. Vorwald had been employed by the School District of River Falls as a custodian for 18 years. The latest back injury occurred in August of 1987. After this injury, various work restrictions were placed upon Mr. Vorwald by his doctors. Those restrictions, among others, included no wet mopping, and no

lifting over 20 pounds (Affidavit of Brenden, R-16, Affidavit of Curtis Vorwald, R-19).[1] After several doctor updates on Mr. Vorwald's condition, it became apparent by September of 1988 that work limitations and restrictions upon him were permanent (R-16). Because of the continuing restrictions, the Personnel Committee of the River Falls School District recommended to the Board that Mr. Vorwald be terminated because he could no longer perform the job of custodian (Affidavit of Healy, R-15).

The undisputed facts in the case before the trial court and the Court of Appeals were that Mr. Vorwald was terminated solely because, in the opinion of the Personnel Committee of the School District of River Falls, he was unable to perform the job of custodian due to the work restrictions that had been placed upon him by his doctors (Affidavits of Brenden and Healy, R-15, R-16).

It is also undisputed that Mr. Vorwald filed a worker's compensation claim based upon the work-related injury which had occurred in August of 1987, and which resulted in permanent work restrictions (R-16, R-21).

It is undisputed that, prior to the meeting wherein Mr. Vorwald was terminated, Charles Brenden, Superintendent of Schools, telephoned Mr. Vorwald and informed him that action on his employment would be taken at the next meeting of the Board. He told Mr. Vorwald that he could be at the meeting, and that he could bring an attorney with him (R-19).

Mr. Vorwald did attend the Board meeting, with his wife, but disputes that he understood what the meeting was to be about (R-19). Thus, for summary judgment purposes, a disputed issue of fact existed with respect to the adequacy of notice and hearing.

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1. "R" hereinafter refers to the record transmitted to the Court of Appeals by the Clerk of the Court for Prince County.

The Board of Education for River Falls has a personnel policy regarding dismissal of non-certified support staff which indicated that prior to dismissal, the Board should provide written notice and an opportunity to be heard (R-18).

Mr. Vorwald, as a custodian, was considered non-certified support staff. There was no other evidence placed before the trial court of any contractual agreement, inplied or otherwise, or collective bargaining agreement between the district and Mr. Vorwald regarding his employment. There was no statutory evidence besides the bare Board Personnel Policy which was presented in support of Mr. Vorwald's claim to a property interest in his employment.

It should be noted that in the Wisconsin Supreme Court, the petitioner specifically relied on the Board policy in and of itself as the grounds for the claimed benefits of continued employment (Respondents' Brief, p. 13).

Mr. Vorwald claimed that he did not receive any notice (R-19) of the meeting wherein his termination was discussed and decided and was deprived of his property interest in employment without due process of law.

REASONS FOR DENYING THE WRIT

I.

THE WRIT SHOULD NOT ISSUE BECAUSE THE DECISION IN THE WISCONSIN SUPREME COURT IS CONSISTENT WITH THIS COURT'S RULINGS ON THE SCOPE OF A PROPERTY INTEREST IN EMPLOYMENT.

When approaching a claim of procedural due process deprivation, the court engages in a two-step inquiry. First, the court

asks whether there exists a liberty or property interest which has been interfered with by the State (*Kentucky Department of Corrections v. Thompson,* 109 S. Ct. 1904, 1908, 490 U.S. 454 (1989), *citing Board of Regents v. Roth*, 408 U.S. 564, 571, 92 S. Ct. 2701, 2706, 33 L. Ed. 2d 548 (1972). The second question examines whether the procedures attendant upon the deprivation were constitutionally sufficient (*Kentucky, supra* at 1908, *citing Hewitt v. Helms*, 459 U.S. 460, 472, 103 S. Ct. 864, 871, 74 L. Ed. 2d 675 (1983)). In this case, the court did not reach the second question because it determined that no facts were presented by the petitioner which showed the existence of the requisite property interest in employment.

The types of interest that constitute property for Fourteenth Amendment purposes are not unlimited; an individual claiming a protected interest must have a legitimate claim of entitlement to it. The sufficiency of a claim of entitlement to a property interest in public employment must be decided by reference to state law. (*Bishop v. Wood*, 96 S. Ct. 2074, 2077, 416 U.S. 341, 344, 48 L. Ed. 684 (1976)).

> Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548.

Vorwald argued that he had a property interest in his employment due to the Board's Personnel Policy (Petitioner's Appendix A-27, R-18), which he argued created a contract under *Holloway v. K-Mart Corp.*, 113 Wis. 2d 143, 334 N.W. 2d 570 (Ct.

App. 1983) or provided "rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" under *Roth*, 408 U.S. at 577, and *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 2700, 33 L. Ed. 2d 570 (1972).

Under Wisconsin law, employment at will is the rule. Absent civil service regulations or laws, or a contract or collective bargaining agreement, a municipal employee is an employee at will and has no property interest in employment. *Vorwald v. School District of River Falls*, 167 Wis. 2d 549, 557, 482 N.W. 2d 93 (1992), *citing Castelaz v. Milwaukee*, 94 Wis. 2d 513, 520, 289 N.W. 2d 259 (1980); *Adamczyk v. Caladonia*, 52 Wis. 2d 270, 273-74, 190 N.W. 2d 137 (1971), *Hough v. Dane County*, 157 Wis. 2d 32, 40-42, 458 N.W. 2d 543 (Ct. App. 1990).

> A Wisconsin public employee has no reasonable expectation of continued employment "absent civil service regulations or laws, or the protections of a contract or collective bargaining agreement authorized by statute.

Hough, 157 Wis. 2d 37, 40.

In this case, the Wisconsin Supreme Court correctly applied Wisconsin state law in finding that the bare personnel policy, in and of itself, did not create an understanding of continued employment under Wisconsin law. While it is true in Wisconsin that an enforceable contract, express or implied by an employee manual, may in some circumstances abrogate the at-will employment relationship, a manual in and of itself does not create any substantive contractual rights. (*See Ferraro v. Koelsch*, 124 Wis. 2d 154, 157-58, 368 N.W. 2d 666 (1985); *Holloway*, 113 Wis. 2d at 146).

There must be an exchange of promises, and the furnishing of additional consideration by the employee which would serve to bind the employer if an express or implied contract is to abrogate the at-will employment relationship (*Forer v. Sears Roebuck and Company,* 36 Wis. 2d 388, 153 N.W. 2d 587 (1967)). Both implied and express contracts require the element of mutual meetings of the minds and an intention to contract. *Garvey v. Bueler,* 146 Wis. 2d 281, 289, 430 N.W. 2d 616 (Wis. Ct. App. 1988), *citing Theruerkauf v. Sutton*, 102 Wis. 2d 176, 183, 306 N.W. 2d 651, 657 (1981).

The single page of the River Falls School District personnel policy, standing alone, was all that was offered in this case to support a claim to a contract of continued employment. No other evidence of any rules or understandings protecting Vorwald's employment was offered in the proceedings below. The bare policy, alone, does not rise to the level of a contract, implied or otherwise. Therefore, the school district's "common law right to discharge an employee at any time without cause was not limited by its self-imposed policies regarding discharge." *Vorwald*, 167 Wis. 2d 549, 558, *citing Holloway*, 113 Wis. 2d at 146, 334 N.W. 2d 570 (Ct. App. 1983). Where the district had not charged its at-will relationship with Vorwald, he had no constitutionally recognized property interest in employment.

The Wisconsin Supreme Court, in correctly applying Wisconsin law, found that there were no facts on the record which would give rise to a property interest in employment based upon either implied or expressed contract. This reading of Wisconsin law is not in conflict, contrary to petitioner's assertion, with Supreme Court rulings as set forth in *Board of Regents v. Roth* and *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). The Court in *Perry* recognized the possibility of an implied contract of continued employment (*Perry, supra*, 92 S. Ct. 2694, 2700); so does Wisconsin law in *Ferraro* and *Koelsch*. But,

because Mr. Vorwald failed to come forward with any allegation or proof of a mutually explicit understanding implied through conduct or promise, no property interest based on "rules or understandings" was shown. Similarly, in *Perry*, the Court referred to state law to determine the existence of a claim to continued employment:

> If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated.

Perry, 92 S. Ct. 2694, 2700, footnote 7.

The Wisconsin Supreme Court's decision is in accord with both Wisconsin law and the mandates of this Court.

II.

THE WISCONSIN SUPREME COURT DECISION IN THIS MATTER DOES NOT CONFLICT WITH *FELDER V. CASEY.*

Finally, the petitioner's reference to the case of *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123 (1988) is inapplicable to this case. *Felder* has no application in this case, which is based on a finding that under Wisconsin law, Vorwald had no property interest in employment. The absence of any property interest was based on the absence of any contract, implied or otherwise, which would abrogate the at-will employment relationship. Vorwald presented no facts which would support a finding, under Wisconsin law, of an enforceable expectation of continued employment.

Felder rejected a Wisconsin State Notice of Claim requirement under the Supremacy Clause. The Supremacy Clause

is not an issue at all with respect to state-created property interests, which are the necessary prerequisites to the federal claim to procedural due process. The Wisconsin Supreme Court's decision in this case was not contrary to the mandate set forth in *Felder v. Casey*.

CONCLUSION

A writ of certiorari should not issue to review the judgment and opinion of the Wisconsin Supreme Court, where that opinion correctly applies Wisconsin law to the facts set forth in the record, Wisconsin law is not in conflict with Supreme Court rulings on the issue of the existence of a property interest in public employment.

Respectfully submitted,

THOMAS TERWILLIGER
Counsel of Record
CASSANDRA B. WESTGATE
TERWILLIGER, WAKEEN, PIEHLER
& CONWAY, S.C.
Attorneys for Respondents